

## Message Text

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PAGE 01 NEW DE 15057 121253Z

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ACTION NEA-10

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FM AMEMBASSY NEW DELHI

TO SECSTATE WASHDC IMMEDIATE 2202

AMEMBASSY DACCA

AMEMBASSY ISLAMABAD

AMEMBASSY KATHMANDU

/AMCONSUL BOMBAY IMMEDIATE 9672

AMCONSUL CALCUTTA

/AMCONSUL MADRAS 3174

AMEMBASSY LONDON

C O N F I D E N T I A L NEW DELHI 15057

E.O. 11652: GDS

TAGS: PINT, IN

SUBJ: SUPREME COURT TERMINATES HEARING ON "BASIC STRUCTURE THEORY."

SUMMARY: THE SUPREME COURT DECIDED TODAY TO DISSOLVE THE 13 MAN BENCH CONVENED NOVEMBER 10 TO RECONSIDER THE 1973 SUPREME COURT FUNDAMENTAL RIGHTS DECISION HOLDING THAT PARLIAMENT CANNOT "ALTER" THE CONSTITUTION'S "BASIC STRUCTURE" THROUGH CONSTITUTIONAL AMENDMENTS. IN ANNOUNCING THE COURT'S DECISION NOT RPT NOT TO REVIEW THE 1973 "BASIC STRUCTURE" RESTRICTION ON PARLIAMENT, THE CHIEF JUSTICE STATED THAT A FULL SUPREME COURT BENCH COULD STILL BE CONVENED TO REVIEW IT IN THE FUTURE. TODAY'S SUPREME COURT DECISION IS A SIGNIFICANT SETBACK TO MRS. GANDHI, WHOSE LEGISLATIVE AND POLITICAL ACTIONS WILL CONTINUE FOR THE FORESEEABLE FUTURE TO REMAIN UNDER THE SHADOW OF THE "BASIC STRUCTURE" STRICTURE. THE COURT'S DECISION WILL ALSO ENCOURAGE THOSE STRONG VIEWS AMONG MRS. CONFIDENTIAL

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PAGE 02 NEW DE 15057 121253Z

GANDHI'S ADVISORS WHICH ARE URGING THAT THE POWERS OF THE

JUDICIARY BE CURBED THROUGH AN ENTIRELY NEW CONSTITUTION  
IF NECESSARY. END SUMMARY.

1. IN A MOVE CARRYING SIGNIFICANT POLITICAL IMPLICATIONS,  
THE SUPREME COURT NOVEMBER 12 ANNOUNCED ITS DECISION TO  
DISSOLVE THE THIRTEEN MAN BENCH THAT HAD BEGUN HEARING ARGUMENTS  
ON THE 1973 FUNDAMENTAL RIGHTS CASE ON NOVEMBER 10. A SUPREME  
COURT ADVOCATE TOLD AN EMBOFF SOON AFTER THE ANNOUNCEMENT  
THAT THE JUDGES HAD VOTED 10-3 (WITH CHIEF JUSTICE RAY AMONG  
THE THREE) TO DROP THE REVIEW OF THE 1973 DECISION, WHICH THE  
GOI HAD REQUESTED. (ANOTHER SOURCE CLOSE TO THE CASE SAID THE  
DECISION WAS UNANIMOUS.) IN ANNOUNCING THE DECISION ON  
BEHALF OF THE COURT, CHIEF JUSTICE RAY STATED THAT A NEW BENCH  
COULD BE CALLED SOMETIME IN THE FUTURE PROVIDED THE COURT, IN  
ITS CONSIDERATION OF AN INDIVIDUAL CASE INVOLVING THE "BASIC  
STRUCTURE" QUESTION SOON TO BE HEARD, DECIDES THERE IS JUSTI-  
FICATION FOR DOING SO.

2. FYI: AS WE REPORTED IN OUR 14024, THE 1973 FUNDAMENTAL  
RIGHTS DECISION HELD, INTER ALIA, THAT PARLIAMENT IS NOT  
EMPOWERED BY THE CONSTITUTION "TO ALTER" THE CONSTITUTION'S  
"BASIC STRUCTURE" OR "FRAMEWORK" THROUGH AMENDMENTS. IN  
EFFECT, THE BASIC STRUCTURE RESTRICTION OVERSHADOWS MRS. GANDHI'S  
LEGISLATIVE AND POLITICAL MANEUVERABILITY. GOI LAWYERS  
PRESSED FOR A COURT REVIEW OF THE BASIC STRUCTURE CONCEPT ON  
THE GROUNDS THAT IT WAS NOT ONLY "WRONG" BUT UNDEFINED. THE  
SUPREME COURT BENCH DISSOLVED TODAY WAS CALLED IN RESPONSE  
TO THE GOI REQUEST, AND WITH A VIEW TO DISPOSING OF EN MASSE  
SEVENTY-FIVE PENDING WRITS BEFORE THE SUPREME COURT THAT  
INVOLVED THE BASIC STRUCTURE DECISION. MOST OF THE WRITS  
DEALT WITH COMPENSATION FOR OFFICIAL LAND REFORM AND NATIONALI-  
ZATION ACTIONS. ONE ANDHRA PRADESH CASE INVOLVED A WRIT  
CONTENDING THAT THE 32ND CONSTITUTIONAL AMENDMENT VIOLATES THE  
CONSTITUTION'S BASIC STRUCTURE BY FORBIDDING ANDHRA PRADESH  
STATE EMPLOYEES FROM QUESTIONING SOME STATE GOVERNMENT EMPLOY-  
MENT POLICIES IN THE STATE HIGHCOURT. IT IS THIS LATTER CASE THAT  
RAY ANNOUNCED THE COURT WOULD RULE ON SEPARATELY, AND THEN  
DEPENDING ON POSSIBLE NEW CIRCUMSTANCES, DECIDE ON A FULL  
REVIEW OF THE 1973 "BASIC STRUCTURE" RESTRICTION.  
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PAGE 03 NEW DE 15057 121253Z

3. THE SUPREME COURT'S DECISION TO DISSOLVE ITS HEARING ON  
THE "BASIC STRUCTURE" QUESTION IS A SERIOUSSETBACK TO MRS. GANDHI,  
THE ARGUMENTS OF LEADING CONSTITUTIONAL LAWYER, N.A. PALKIWALA,  
WHO BETWEEN THE JUNE 12 ALLAHABAD DECISION AND THE JUNE  
26 EMERGENCY PROCLAMATION, WAS MRS. GANDHI'S CHIEF CONSUL  
BEFORE THE SUPREME COURT, APPEAR TO HAVE PRODUCED THE COURT'S  
DECISION. SINCE THE HEARING OPENED TWO DAYS AGO, PALKIWALA

HAS ARGUED FORCEFULLY THAT THE COURT'S 1973 DECISION NEEDED TO BE ACCEPTED AS "THE LAW OF THE LAND." THE COURT, HE HELD, SHOULD CONSIDER INDIVIDUAL CASES ON THE BASIS OF THE "BASIC STRUCTURE" RESTRICTION ALREADY DECIDED, AND IN THE PROCESS DEFINE ITS LIMITS. IT SHOULD NOT, ON THE GOI'S REQUEST REVIEW THE DECISION ITSELF. ACCORDING TO A REPORT FROM THE LAW CORRESPONDENT OF THE RESPECTED HINDU - WHO WAS IN THE COURTROOM, PALKIWALA HELD FURTHER THAT SUCH A REVIEW WOULD START A PERNICIOUS PRECEDENT WHICH WOULD GRAVELY IMPAIR THE CONTINUITY OF THE LAW AND MAKE IT DEPENDENT ON THE COMPOSITION OF THE BENCH. A SECOND REPORT FROM THE COURTROOM BY THE INDIAN EXPRESS' LEGAL CORRESPONDENT QUOTES PALKIWALA AS CLAIMING THAT "RECONSIDERATION" OF THE 1973 DECISION COULD PAVE THE WAY FOR PARLIAMENT, THROUGH AMENDMENTS, TO ABOLISH ALL STATES OR HAVE ONE PARTY RULE. IN AN UNRELEASED WRITTEN BRIEF PREPARED FOR THE COURT, PALKIWALA CRITICIZED THE GOI AND ITS CENSORSHIP STATING, "EVEN JUDGEMENTS AND REPORTS OF JUDICIAL PROCEEDINGS INCLUDING PROCEEDINGS IN THIS VERY CASE CANNOT BE PUBLISHED HOWEVER ACCURATE THEY MAY BE, EXCEPT IN A FORM THAT IS ACCEPTABLE TO THE CENSOR. THIS CONSTITUTES GROSS CONTEMPT OF COURT BY THE EXECUTIVE."

4. COMMENT: ACCORDING TO OUR LEGAL CONTACTS, TODAY'S SUPREME COURT DECISION TO DISSOLVE THE BENCH CALLED TO REVIEW THE 1973 RULING ITSELF IS UNPRECEDENTED IN THE COURT'S HISTORY. THE DISSOLUTION INDICATES THAT A MAJORITY OF THE COURT DOES NOT BELIEVE THAT THERE IS SUFFICIENT JUSTIFICATION TO CALL FOR A RECONSIDERATION OF THE "BASIC STRUCTURE" RESTRICTION ON PARLIAMENT'S AMENDING POWER. THE COURT'S DECISION WILL STRENGTHEN THE HAND OF THOSE ADVISORS AROUND THE PRIME MINISTER WHO HAVE PRESSED FOR A DISMANTLING OF THE COURT'S POWERS - THROUGH A CONSTITUENT ASSEMBLY IF NECESSARY.

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PAGE 04 NEW DE 15057 121253Z

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